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No. 01-1444

In the Supreme Court of the United States

BEN CHAVEZ, PETITIONER

v.

OLIVERIO MARTINEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether petitioner, a police officer, is entitled to qualified immunity in a lawsuit under 42 U.S.C. 1983 alleging that his questioning of respondent was impermissibly coercive and violated respondent's Fifth and Fourteenth Amendment rights, where no statement made by respondent has been used against him in a criminal case.

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INTEREST OF THE UNITED STATES

This case concerns the law of qualified immunity and the interpretation of the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment. The same principles of qualified immunity that apply in civil actions against state and local officials under 42 U.S.C. 1983 also apply in civil actions against federal personnel under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 n.30 (1982). Because of its role in the investigation and prosecution of federal crimes, the United States has a substantial interest in the interpretation of the Fifth Amendment Self-Incrimination Clause and (because of its implications for interpreting the analogous provision of the Fifth Amendment) the Fourteenth Amendment Due Process Clause. The United States also has an interest in effective deterrence of unconstiutional

conduct by government employees and in the faithful application of the nation's civil rights laws.

STATEMENT

1. On the evening of November 28, 1997, police officers Maria Pena and Andrew Salinas were investigating suspected narcotics activity near a vacant lot in Oxnard, California. Pet. App. 2a. While questioning an individual, they heard a bicycle approaching on the unlit path that crossed the lot. Officer Salinas ordered the rider, respondent Oliverio Martinez, to dismount, spread his legs, and place his hands behind his head. Respondent complied. *Id.* at 2a-3a.

During a protective pat-down, Officer Salinas discovered a knife in respondent's waistband. Pet. App. 3a; C.A. App. 121. Salinas notified Pena and pulled respondent's hands from behind his head to place him in handcuffs. Salinas maintains that respondent attempted to flee; respondent claims that he offered no resistance and Salinas tackled him without provocation. A struggle ensued. Officers Salinas and Pena testified that respondent drew Salinas' pistol and pointed it at them (see C.A. App. 68-71, 183-185); respondent alleges that he grabbed Salinas' hand to stop him as he drew his pistol from its holster. *Id.* at 85. It is undisputed, however, that Officer Salinas shouted "[h]e's got my gun." Pet. App. 3a. Officer Pena drew her pistol and fired at respondent. One bullet struck respondent in the face, injuring his optic nerve and blinding him. Another bullet fractured a vertebra, paralyzing his legs. Three bullets struck his leg. The officers handcuffed respondent and called for assistance. *Ibid.*; C.A. App. 62.

Petitioner Ben Chavez, a police sergeant and patrol supervisor, arrived at the scene a short time later along with paramedics. The handcuffs were removed from respondent. C.A. App. 271. After speaking with Salinas and Pena about what had happened, petitioner ordered Salinas and Pena separated so they would not discuss the incident. *Id.* at 39, 100,

116. Paramedics stabilized respondent for transport to a hospital emergency room. Petitioner accompanied respondent in the ambulance. *Id.* at 270, 275.

After arriving at the hospital, and in the presence of medical personnel, petitioner conducted a tape-recorded interview of respondent "intermittently for approximately 45 minutes." Pet. App. 27a. Because petitioner periodically stopped questioning and waited outside the room as medical personnel treated respondent, the interview consumed only approximately 10 minutes of tape. See J.A. 6-20. Petitioner identified himself as a policeman and asked respondent to "tell [him] what happened." J.A. 9. Respondent answered that he had "fought" with the police but did not know why they had fought. Petitioner asked respondent whether he had "grab[bed] the gun of the other policeman." J.A. 9-10. Respondent said that he had "pulled the gun" from Salinas' holster (J.A. 13) and "pointed it" at the police. J.A. 14. Respondent complained repeatedly about pain, *e.g.*, J.A. 8, 16, 17, 18, said that he wanted treatment, J.A. 12, 13, 17, 18, and stated several times that he believed he was dying. J.A. 7, 8, 9, 11, 12, 19. In the middle of the interview, respondent said "I am not telling you anything until they treat me." J.A. 12. Petitioner responded that medical personnel were treating respondent and he wanted to get respondent's side of the story so he did not have to rely solely on Salinas' and Pena's description of events. J.A. 13. When respondent later said "I don't want to say anything anymore" (J.A. 17), petitioner asked respondent if he thought he was going to die (J.A. 18), assured him "the doctors are going to help you with all they can do" (J.A. 19), and ended the interview. *Ibid.* Near the end of the interview, respondent said that he had been drinking that day and had used heroin that evening. J.A. 15-16. It is undisputed that petitioner did not recite *Miranda* warnings. C.A. App. 113. Respondent has not been charged with any crime stemming from the incident.

2. Respondent filed a complaint under 42 U.S.C. 1983 against Sergeant Chavez, Officers Salinas and Pena, several other officers, and the City of Oxnard. Respondent alleged that the officers violated his constitutional rights by stopping him without probable cause and using excessive force (in violation of the Fourth Amendment), tampering with evidence (in violation of the Fourteenth Amendment), inflicting cruel and usual punishment (presumably in violation of the Eighth Amendment or Fourteenth Amendment), and subjecting him to coercive interrogation (in violation of the Fifth and Fourteenth Amendments).[1] Pet. App. 4a-5a. The defendants asserted a qualified immunity defense. Among other things, petitioner argued that it was not "clearly established" that the circumstances of his questioning of respondent rendered it unconstitutionally coercive (C.A. App. 434-443), and that precedent did not clearly indicate that it was unconstitutional for an officer "to preserve the key non-police witness's account of events before the individual expires." *Id.* at 445.

The district court granted respondent partial summary judgment on his Fifth and Fourteenth Amendment claims arising from the interrogation. Pet. App. 19a-30a. The district court held that petitioner had "coerced" (*id.* at 23a) respondent's statement in violation of his Fifth and Fourteenth Amendment rights, emphasizing the seriousness of respondent's injuries and the fact that questioning persisted despite respondent's request for medical treatment and statements that he did not wish to talk. The court denied respondent summary judgment on his claims that petitioner had violated his Eighth Amendment rights through deliberate indifference to his medical needs and by inflicting cruel and unusual punishment. Noting that respondent was "not a convicted inmate" (*ibid.*), the court construed those claims as a claim of deliberate indifference to medical needs in violation of the Due Process Clause of the Fourteenth Amendment, but denied summary judgment "because there is insufficient evidence to establish that Chavez's actions interfered with plaintiff's treatment." *Id.* at 24a.[2]

[1] Respondent also claimed that the City and police supervisors had failed to train and supervise the officers adequately, and alleged that the defendants had committed various state-law torts. Pet. App. 16a. Respondent later dismissed these claims, and they are not at issue here. *Ibid.*

The court then held that petitioner was not entitled to qualified immunity, stating that "[t]he law against coerced confessions was clearly established at the time of [respondent's] interview," and "no reasonable officer would believe that an interview of an individual receiving treatment for life-threatening injuries * * * was constitutionally permissible." Pet. App. 29a. The court rejected petitioner's claim that he was merely trying to preserve evidence and was not "trying to build a criminal case against a man who was about to expire" (*id.* at 28a-29a), stating that petitioner had no way of knowing "whether or not a prosecutor would charge [respondent] if he survived." *Id.* at 29a.

3. The court of appeals affirmed. Pet. App. 1a-14a. The court first concluded that petitioner had "violated the Fifth and Fourteenth Amendments by subjecting [respondent] to a coercive, custodial interrogation while he received treatment for life-threatening gunshot wounds." *Id.* at 6a. Relying on its prior en banc decision in *Cooper* v. *Dupnik*, 963 F.2d 1220 (9th Cir.), cert. denied, 506 U.S. 953 (1992), the court held that petitioner had violated respondent's Fifth Amendment rights when he "'actively compelled and coerced' [respondent] to utter statements that [he] could reasonably believe might be used in a criminal prosecution."

[2] The district court also denied respondent summary judgment on his claim that his detention violated the Fourth Amendment, concluding there was a genuine issue of material fact regarding the officers' reasonable suspicion for stopping him. Pet. App. 25a.

Pet. App. 9a. Although the statements "were not used against [respondent] in a criminal proceeding" (*ibid.*), the court, again relying on *Cooper*, dismissed that fact as immaterial because "the Fifth Amendment's purpose is to prevent coercive interrogation practices that are 'destructive of human dignity.'" *Ibid.* (quoting *Cooper*, 963 F.2d at 1239 (internal quotation marks omitted)).[3] The court of appeals also concluded that because due process is offended by "coercive behavior of law-enforcement officers in pursuit of a confession" (*id.* at 10a-11a (quoting *Cooper*, 963 F.2d at 1244-1245)), "a police officer violates the Fourteenth Amendment when he obtains a confession by coercive conduct, regardless of whether the confession is subsequently used at trial." *Id.* at 10a.

The court next held that qualified immunity was not available because the limits on interrogation were clearly established at the time of the incident (Pet. App. 11a), emphasizing that this Court had "held a virtually indistinguishable interrogation unconstitutional in *Mincey* v. *Arizona*, [437 U.S. 385 (1978)]." *Id.* at 12a. The court did not address petitioner's claim that the questioning was undertaken not to obtain incriminating statements, but to preserve the account of a key witness whom he thought to be dying.

SUMMARY OF ARGUMENT

Respondent's complaint about petitioner's tactics in interviewing him, when statements elicited were never used against respondent in any forum, does not state a violation of respondent's Fifth and Fourteenth Amendment rights, much

[3] Although the court "recognize[d] the existence of Supreme Court dicta to the contrary" (Pet. App. 10a n.3 (citing *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)), the court declined to follow it, stating that "[w]here the two are at odds, * * * we are bound to follow our own binding precedent rather than Supreme Court dicta." *Ibid.*

less a clearly established one. In a variety of contexts, this Court has made clear that so long as the government makes no use of a compelled statement in a criminal case, the Fifth Amendment is not violated. See, *e.g.*, *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). Similarly, this Court's cases addressing the voluntariness of confessions under the Fourteenth Amendment Due Process Clause establish only a procedural "right to be free of a conviction based upon a coerced confession" (*Jackson* v. *Denno*, 378 U.S. 368, 377 (1964)) and reject the notion that, absent use of the coerced confession in a criminal proceeding, "the victim has a legal grievance against the police." *Lyons* v. *Oklahoma*, 322 U.S. 596, 605 (1944).

To be sure, the Constitution does prohibit police misconduct "so brutal and so offensive to human dignity" that it "shocks the conscience." *Rochin* v. *California*, 342 U.S. 165, 174, 172 (1952). But no such claim can be made on the facts of this case. Although respondent undoubtedly was in grave condition and suffering great pain because of his preexisting injuries, petitioner did not touch respondent or employ such harmful psychological techniques that his conduct was "arbitrary in the constitutional sense." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 846 (1998). And far from being "unjustifiable by any government interest" (*id.* at 849), petitioner was seeking to preserve the statement of the victim of (and thus the key witness to) a police shooting. Petitioner's conduct, rather than constituting sanctionable police misconduct, had the potential to preserve evidence of possible police misconduct. More broadly, the court of appeals' recognition of a broad new right to be free of coercive questioning, irrespective of the use to which resulting statements are put, will undermine legitimate law-enforcement efforts to obtain potentially life-saving information during emergencies.

Even were the Court to recognize such a right, qualified immunity is appropriate because it was not clearly estab-

lished at the time of petitioner's conduct. The Ninth Circuit stands alone in recognizing a Fifth Amendment right to be free of coercive questioning regardless of the use of resulting statements, and it has acknowledged that its view conflicts with this Court's statement in *Verdugo-Urquidez* that the Fifth Amendment is not violated unless a compelled statement is used at trial. Although that statement may be dicta, a police officer should not be subject to liability for heeding an authoritative and clear statement from this Court. Moreover, there is no allegation that petitioner engaged in the sort of brutal physical or psychological coercion that would have put a reasonable officer on notice that his conduct was so "egregious" (*Lewis*, 523 U.S. at 846) that it clearly violated respondent's substantive due process rights.

ARGUMENT

THE COURT OF APPEALS ERRED IN DENYING PETITIONER QUALIFIED IMMUNITY

In evaluating a qualified immunity defense, a court must undertake two distinct inquiries. *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001). The court first must decide whether the facts as alleged state a violation of a constitutional right. If they do, the court must then decide whether that right was clearly established "under settled law," *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (per curiam), such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. Respondent's effort to obtain monetary damages for the claimed denial of his Fifth and Fourteenth Amendment rights fails on both counts.

A. Because Respondent's Statements Were Not Used Against Him In A Criminal Case, His Fifth Amendment Right Against Compelled Self-Incrimination Was Not Violated

1. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." By its own terms, the provision does not prohibit all compelled self-incrimination, only that occurring "in [a] criminal case." Of course, this Court has not strictly limited the Fifth Amendment's protections to individuals testifying during criminal trials. See, *e.g.*, *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973) (noting that Fifth Amendment includes a broader "privilege[] * * * not to answer official questions put to [a witness] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings"). While the Fifth Amendment privilege may be invoked during an investigation to prevent Fifth Amendment rights from being undermined in a later criminal proceeding, see *Michigan* v. *Tucker*, 417 U.S. 433, 440-441 (1974), the Fifth Amendment is not violated until a compelled statement has been used "in [a] criminal case." As this Court has observed, "[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, *a constitutional violation occurs only at trial.*"[4] *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (emphasis added; citation omitted); accord *New York* v. *Quarles*, 467 U.S. 649, 686 (1984) (Marshall, J., dissenting) ("All the Fifth Amendment forbids

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[4] This Court has made clear that use at trial is not the *only* use "in [a] criminal case" prohibited by the Fifth Amendment. See, *e.g.*, *Mitchell* v. *United States*, 526 U.S. 314, 327 (1999) ("[t]o maintain that sentencing proceedings are not part of 'any criminal case' is contrary to the law").

is the introduction of coerced statements at trial."); cf. *Weatherford* v. *Bursey*, 429 U.S. 545, 556, 558 (1977) (holding that no Sixth Amendment violation has occurred where interference with assistance of counsel has no effect on trial); *Massiah* v. *United States*, 377 U.S. 201, 206 (1964) (defendant "was denied the basic protections of th[e] [Sixth Amendment] guarantee when *there was used against him at his trial* evidence of his own incriminating words," deliberately elicited after indictment in the absence of counsel) (emphasis added).

2. Numerous distinctive aspects of Fifth Amendment doctrine confirm that the Self-Incrimination Clause provides a "*trial* right" for criminal defendants (*Withrow* v. *Williams*, 507 U.S. 680, 691 (1993) (quoting *Verdugo-Urquidez*, 494 U.S. at 264)), rather than a limit on the primary conduct of law-enforcement officers in the field. First, this Court has long held that the Fifth Amendment does not bar the compulsion of incriminating testimony so long as the witness is afforded immunity coextensive with that offered by the Constitution. See, *e.g.*, *Brown* v. *Walker*, 161 U.S. 591, 610 (1896); cf. *Counselman* v. *Hitchcock*, 142 U.S. 547, 564-565 (1892). In *Kastigar* v. *United States*, 406 U.S. 441 (1972), this Court held that a witness could be compelled to testify despite his invocation of the privilege if given immunity under 18 U.S.C. 6002 "from the use of compelled testimony, as well as evidence derived * * * therefrom" (*id.* at 453), reasoning that "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination." *Ibid.* As the Court explained in *Brown* v. *Walker*, "since [the witness'] testimony could not be used against him in any criminal case * , he is not compelled to be a witness 'against himself.'" 161 U.S. at 603-604 (quoting *Ex parte Cohen*, 38 P. 364, 365 (Cal. 1894)). Accord *McKune* v. *Lile*, 122 S. Ct. 2017, 2025 (2002) ("If the State of Kansas offered immunity, the self-incrimination privilege would not be

implicated.") (plurality opinion); *id.* at 2043-2045 (Stevens, J., dissenting). See generally Steven D. Clymer, *Are Police Free to Disregard* Miranda?, 112 Yale L.J. (forthcoming Dec. 2002) (immunity doctrine "demonstrates that the [Fifth Amendment] permits compulsion; it only imposes later restrictions on the government when it compels answers").

This Court's recent decision in *United States* v. *Balsys*, 524 U.S. 666 (1998), allowing the compulsion of testimony despite fears of foreign prosecution, underscores that the Fifth Amendment establishes a trial right rather than a limit on primary conduct. In *Balsys*, federal investigators sought the testimony of a person suspected of having participated in Nazi persecution during World War II. The witness claimed the Fifth Amendment privilege against self-incrimination based on his fear of prosecution abroad. The Court rejected his assertion of the privilege, noting that while he was being compelled to be a witness against himself, a foreign prosecution did not represent "a 'criminal case' for purposes of the privilege against self-incrimination." 524 U.S. at 672.

The Court rejected the argument that recognition of the privilege under those circumstances was necessary to protect a constitutional interest in "the inviolability of the human personality" (524 U.S. at 691 (quoting *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964))—the very rationale on which the Ninth Circuit based its decision. See Pet. App. 9a (quoting *Cooper* v. *Dupnik*, 963 F.2d 1220, 1239, cert. denied, 506 U.S. 953 (1992)). The Court reasoned that if that rationale were correct, a violation of the Fifth Amendment, like a violation of the Fourth Amendment, would be "complete at the moment of illicit intrusion, whatever use may or may not later be made of [its] fruits." 524 U.S. at 692. "The Fifth Amendment tradition, however, offers no such degree of protection. If the Government is ready to provide the requisite use and derivative use immunity, the protection goes no further: no violation of personality is

recognized." *Ibid.* As the *Balsys* Court noted, the deficiency of the "inviolability of the human personality" rationale is also apparent from the fact that witnesses constitutionally can be compelled to testify "when a witness's response will raise no fear of criminal penalty" (*ibid.*), and can be compelled to produce all manner of incriminating (but personal) non-testimonial evidence, such as blood specimens, *Schmerber* v. *California*, 384 U.S. 757, 762 (1966), voice exemplars, *United States* v. *Dionisio*, 410 U.S. 1 (1973), and handwriting samples. *Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967). See also *Doe* v. *United States*, 487 U.S. 201, 213 n.11 (1988) (finding no violation of the privilege "[d]espite the impact upon the inviolability of the human personality"). See generally Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cinn. L. Rev. 671, 687-688 (1968) ("as an argument for the [Fifth Amendment] privilege[,] * * * privacy simply will not parse").

In a variety of other contexts, the Court has confirmed that the Fifth Amendment is not violated by compelled testimony so long as the government makes no use of it in a criminal case. In the so-called "penalty cases," for example, the Court has held that governments may use threats of economic penalties, such as job termination or loss of government contracts, to elicit statements if there are established restrictions on their later use in criminal cases. See, *e.g.*, *Lefkowitz* v. *Turley*, 414 U.S. at 84, 85 ("the State may insist that [contractors] * * * either respond to relevant inquiries about the performance of their contracts or suffer cancellation," but "the State must recognize what our cases hold: that answers elicited upon the threat of the loss of employment are compelled and inadmissible in evidence"); *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806 (1977) ("[p]ublic employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their

official duties if they have not been required to surrender their constitutional immunity" against later use of statements in criminal proceedings). See also *Wiley* v. *Doory*, 14 F.3d 993, 996 (4th Cir. 1994) (Powell, J.) ("language in [the penalty cases] suggests that the right against self-incrimination is not violated by the mere compulsion of statements, without a compelled waiver of the Fifth Amendment privilege or the use of the compelled statements against the maker in a criminal proceeding"), cert. denied, 516 U.S. 824 (1995).

Likewise, in *Baltimore City Department of Social Services* v. *Bouknight*, 493 U.S. 549, 561-562 (1990), the Court held that the Fifth Amendment did not privilege a custodial mother's refusal to comply with a court order to produce a child despite her claim that the act of production would incriminate her, but noted that "the Fifth Amendment protections are not * * * necessarily unavailable to the person who complies with the regulatory requirement [to produce] after invoking the privilege and subsequently faces prosecution." And in *Minnesota* v. *Murphy*, 465 U.S. 420, 436 n.7 (1984), the Court wrote that a state may compel probationers to "answer[] * * * even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding."

3. The differences between the Court's Fourth and Fifth Amendment jurisprudence underscore the conclusion that the Fifth Amendment is violated only by the use of compelled testimony, rather than by out-of-court acts of compulsion. In contrast to the Fifth Amendment trial right, the Fourth Amendment "prohibits 'unreasonable searches and seizures' whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is 'fully accomplished' at the time of an unreasonable governmental intrusion." *Verdugo-Urquidez*, 494 U.S. at 264; accord

Balsys, 524 U.S. at 692. Because the constitutional violation is already complete, the "admissibility of evidence obtained in violation of the Fourth Amendment is determined after, and apart from, the violation," by application of a judicially created exclusionary rule. *United States* v. *Janis*, 428 U.S. 433, 443 (1976). "In contrast * * * the Fifth Amendment[] [is a] direct command against the admission of compelled testimony." *Ibid.* As the Court noted in *Adams* v. *Maryland*, 347 U.S. 179 (1954), "a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute." *Id.* at 181.[5]

That difference reflects the Fifth Amendment's core purpose. While the Fourth Amendment protects antecedent interests in privacy and so imposes limits on the primary conduct of law enforcement officers in the field, the Fifth Amendment does not "serve some value necessarily divorced

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[5] Because *Miranda* warnings safeguard this "fundamental *trial* right" of criminal defendants, *Withrow*, 507 U.S. at 691; cf. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 240 (1973) (noting that "the basis for [the *Miranda*] decision was the need to protect the fairness of the trial itself"), this Court has held that claimed *Miranda* violations in state-court proceedings—unlike Fourth Amendment claims, see *Stone* v. *Powell*, 428 U.S. 465 (1976)—are cognizable on federal habeas review. *Withrow*, 507 U.S. at 686-687, 691-693. There is language in some of the Court's opinions suggesting that the "Fifth Amendment privilege * * * is not an adjunct to the ascertainment of truth" (*Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 416 (1966)), and serves values more "like the guarantees of the Fourth Amendment." *Ibid.* That language was not necessary to *Tehan*'s holding declining to apply retroactively the adverse comment rule of *Griffin* v. *California*, 380 U.S. 609 (1965). Moreover, that language is inconsistent with prevailing Fifth Amendment doctrine holding that the privilege is a trial right rather than a restriction on primary conduct, and conflicts with the rationale of both *Withrow*, *supra*, and *Balsys*, 524 U.S. at 692 (distinguishing operation of Fifth Amendment from that of Fourth Amendment).

from the correct ascertainment of guilt." *Withrow*, 507 U.S. at 692. Rather, the Fifth Amendment's "*sole concern* is to afford protection against being forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts." *Kastigar*, 406 U.S. at 453 (emphasis added; internal quotation marks omitted; ellipses in original); *Brown* v. *Walker*, 161 U.S. at 605-606 ("The design of the constitutional privilege is * * * to protect [the witness] against being compelled to furnish evidence to convict him of a criminal charge.").[6]

Finally, the difference in the function of the Fourth and Fifth Amendments is reflected in the more elaborate exigent circumstances jurisprudence under the Fourth Amendment. Because the Fourth Amendment regulates primary police conduct, this Court has long recognized a need to exempt police efforts to respond to exigent circumstances. See, *e.g.*, *Johnson* v. *United States*, 333 U.S. 10, 14-15 (1948). In the Fifth Amendment context, the need for such an exemption is reduced, because the Amendment itself does not directly regulate primary police conduct. Accordingly, this Court has recognized only a limited public safety exception to the *Miranda* rule, see *New York* v. *Quarles*, 467 U.S. at 655-658, rather than a broad exigent circumstances doctrine. And, precisely because the Fifth Amendment does not directly

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[6] To be sure, the Court has suggested that the Fifth Amendment also furthers other goals, including the one relied upon by the Ninth Circuit—guarding against interrogation practices that are "destructive of human dignity." Pet. App. 9a (quoting *Cooper*, 963 F.2d at 1239 (quoting *Miranda* v. *Arizona*, 384 U.S. 436, 457-458 (1966)). However, just a week after *Miranda*, the Court cautioned that the Fifth Amendment "has never been given the full scope which the values it helps to protect suggest." *Schmerber*, 384 U.S. at 762. Since then, the Court has cautioned against resting decisions on such "highly general statements of policy," noting that they do not "even purport to weigh" the full range of concerns in addressing the Fifth Amendment's scope, and has expressly rejected the "human dignity" rationale. *Balsys*, 524 U.S. at 691.

regulate primary police conduct, some Justices questioned the need for even a limited exception. *Id.* at 686 (Marshall, J., dissenting); see also pp. 23-25, *infra* (arguing that standards for admitting evidence should not be equated with standards for permissible police conduct).

4. Because the exclusion of a compelled confession from evidence in a criminal case itself prevents a violation of the Self-Incrimination Clause, there is no need for a *Bivens* action to remedy a violation. Cf. *DeShawn E.* v. *Safir*, 156 F.3d 340, 346 (2d Cir. 1998) (appropriate course under Fifth Amendment is "'exclusion from evidence of * * * self-incriminating statements' and 'not a § 1983 action'"). As this Court has recently emphasized, there is no need for the courts to infer a *Bivens* action when doing so is unnecessary to remedy the underlying constitutional violation. See *Correctional Servs. Corp.* v. *Malesko*, 122 S. Ct. 515, 521 (2001). While *Bivens* actions are a necessary remedy in the Fourth Amendment context, where the exclusionary rule is itself "too late" to remedy a violation (*United States* v. *Calandra*, 414 U.S. 338, 347 (1974)), there is no comparable unmet need here. Cf. *New York* v. *Quarles*, 467 U.S. at 669 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("The harm caused by failure to administer *Miranda* warnings relates only to admission of testimonial self-incriminations, and the suppression of such incriminations should by itself produce the optimal enforcement of the *Miranda* rule.").[7]

[7] Moreover, the relevant state actor in most Self-Incrimination Clause contexts would be the prosecutor who attempted to introduce the statement, who would be entitled to absolute immunity from such a claim. See *Burns* v. *Reed*, 500 U.S. 478, 492 (1991).

B. Petitioner's Interrogation Did Not Violate Respondent's Fourteenth Amendment Due Process Rights

1. The court of appeals based its decision in this case on its prior en banc holding in *Cooper* v. *Dupnik*, *supra* (see Pet. App. 10a-11a), that individuals have a right as a "matter of substantive due process" (963 F.2d at 1244) not to be subject to coercive questioning irrespective of whether resulting statements are used against them. *Cooper* based that conclusion on a misreading of a line of cases in which this Court held that statements taken involuntarily from a suspect are inadmissible at trial. See *ibid.* (citing *Brown* v. *Mississippi*, 297 U.S. 278, 287 (1936)). Beginning with *Brown* and continuing "in some 30 different cases decided during the era that intervened between *Brown* and *Escobedo* v. *Illinois*, 378 U.S. 478 [(1964)]" this Court "refined the [voluntariness] test into an inquiry that examines 'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession." *Dickerson* v. *United States*, 530 U.S. 428, 434 (2000) (internal quotation marks omitted). However, far from supporting the court of appeals' conclusion, those cases recognize a *procedural* due process right to fair fact-finding *at trial*, and explicitly rejected the suggestion that defendants have a substantive right not to be questioned.

Brown involved confessions coerced by means of physical torture: Suspects were beaten and told that the abuse would continue until they confessed to a murder. The Court squarely framed the issue to be the fairness of the trial, rather than the means by which the confessions were obtained: "The question in this case is whether convictions, which rest solely upon confessions shown to have been extorted * * * by brutality and violence, are consistent with the due process of law required by the Fourteenth Amendment." 297 U.S. at 279. The Court noted that the freedom of the state "to regulate the procedure of its courts in accordance with its own conceptions of policy" was limited

by the constraints of fundamental fairness (*id.* at 285 (quoting *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934)), concluding that "*the use of the confessions thus obtained as the basis for conviction* * * * was a clear denial of due process." 297 U.S. at 286 (emphasis added). Likening the case to the knowing use of perjured testimony to "contrive a conviction through the pretense of a trial" (*ibid.*), the Court reasoned "the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence." *Ibid.*

While the voluntariness rule began as a protection against unreliable evidence, it expanded to exclude involuntary confessions regardless of their reliability. But throughout, the Court has maintained that "[t]he aim of the requirement of due process is * * * to prevent fundamental unfairness *in the use of evidence*." *Lisenba* v. *California*, 314 U.S. 219, 236 (1941) (emphasis added); accord, *e.g.*, *Malinski* v. *New York*, 324 U.S. 401, 404 (1945) (framing question as "whether there has been a violation of the due process clause of the Fourteenth Amendment by the introduction of an involuntary confession"); *Haynes* v. *Washington*, 373 U.S. 503, 516 (1963) (inquiry involves "determining whether the circumstances under which the confession was made were such that its admission in evidence amounts to a denial of due process"); *Jackson* v. *Denno*, 378 U.S. 368, 385-386 (1964) ("the Fourteenth Amendment forbids the use of involuntary confessions"); *Mincey* v. *Arizona*, 437 U.S. 385, 402 (1978) (due process "requires that statements obtained [involuntarily] cannot be used in any way against a defendant at his trial"). Indeed, the Court has characterized the defendant's interest as a "right to be *free of a conviction* based upon a coerced confession." *Jackson* v. *Denno*, 378 U.S. at 377 (emphasis added).

Although the Court has rightly condemned the use of brutality to extort confessions, it has clearly indicated that

the use of such tactics is relevant to the voluntariness inquiry only because it affects the admissibility of resulting statements. In *Lyons* v. *Oklahoma*, 322 U.S. 596 (1944), police had coerced a confession from a suspect and obtained a second confession several hours later. While "improper methods were used to obtain [the first] confession," the Court noted that "that confession was not used at the trial." *Id.* at 602. Because the Court concluded the second confession was voluntary, it held that its introduction at trial was not a violation of due process. *Id.* at 604-605. The Court explicitly rejected the notion that the voluntariness test restricted the primary conduct of law enforcement: "A coerced confession is offensive to basic standards of justice, *not because the victim has a legal grievance against the police*, but because declarations procured by torture are not premises from which a civilized forum will infer guilt." *Id.* at 605 (emphasis added). Cf. *Lisenba*, 314 U.S. at 235 ("[P]etitioner does not, and cannot, ask redress in this proceeding for any disregard of due process prior to his trial. The gravamen of his complaint is the unfairness in the use of his confessions, and what occurred in their procurement is relevant only as it bears on that issue."); *Stroble* v. *California*, 343 U.S. 181, 197 (1952) ("[w]hen this Court is asked to reverse a state court conviction as wanting in due process, illegal acts of state officials prior to trial are relevant only as they bear on petitioner's contention that he has been deprived of a fair trial").[8]

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[8] Although there is some language in *Miller* v. *Fenton*, 474 U.S. 104 (1985), suggesting that use of coercion itself violates the Constitution, see *id.* at 117 (discusses determination whether "the confession was obtained in a manner consistent with the Constitution"), taken in the context of other language in the opinion, see *id.* at 116 (noting that due process right "assures that *a conviction will not be secured* by inquisitorial means") (emphasis added), that decision does not depart from this Court's consistent rule that the voluntariness inquiry "test[s] admissibility." *Ibid.*

2. Nor can respondent make out any claim of a substantive due process "right[] to be free from police coercion." Pet. App. 11a. The analysis of any claim to a substantive due process right should begin with "a 'careful description' of the asserted fundamental liberty interest." *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997); *Reno* v. *Flores*, 507 U.S. 292, 302 (1993). Because of the expansive meaning of the word "coercive" (Pet. App. 11a), coercive behavior might include such relatively mild conduct as persistent questioning in the face of a request to stop. However, there is no legal basis for establishing such a broad substantive due process "right to silence." *Cooper*, 963 F.2d at 1248. This Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. * * * We must therefore exercise the utmost care whenever we are asked to break new ground in this field." *Glucksberg*, 521 U.S. at 720 (quoting *Collins* v. *Harker Heights*, 503 U.S. 115, 125 (1992)). It would be difficult to assert that a right not to be subject to police questioning is so "deeply rooted in this Nation's history and tradition" to be considered "fundamental." *Glucksberg*, 521 U.S. at 720-721. As this Court has recognized, "[i]t is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 232 (1973) (quoting *Miranda* v. *Arizona*, 384 U.S. 436, 477-478 (1966)). Indeed, "[u]nless his silence is protected by the privilege against self-incrimination, the criminal defendant no less than any other citizen is obliged to assist the authorities." *Roberts* v. *United States*, 445 U.S. 552, 558 (1980). There is therefore no basis for creating any constitutional right to be free of unwanted police questioning.

This is not to say that the Constitution does not impose limits on police misconduct. However, the Fourteenth

Amendment only prohibits police practices that are "so brutal and so offensive to human dignity" (*Rochin* v. *California*, 342 U.S. 165, 174 (1952)) that they "shock[] the conscience." *Id.* at 172 (entering house without warrant, forcing open mouth and use of stomach pump to extract illicit narcotics). Cf. *Breithaupt* v. *Abram*, 352 U.S. 432, 436-437 (1957) (distinguishing *Rochin*; taking blood sample from unconscious defendant does not "shock[] the conscience"). It does not convert every inadmissible confession into a constitutional tort remediable with money damages. This Court has "repeatedly emphasized that only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Lewis*, 523 U.S. at 846. Thus, "conduct intended to injure in some way *unjustifiable by any government interest* is the sort of official action most likely to rise to the conscience-shocking level." *Id.* at 849 (emphasis added); cf. *Youngberg* v. *Romeo*, 457 U.S. 307, 320 (1982) (in determining whether substantive due process right has been violated, "it is necessary to balance 'the liberty of the individual' and 'the demands of an organized society' ").

Petitioner's conduct falls far short of that standard. Far from being "unjustifiable," it was entirely proper for petitioner to attempt to preserve the statement of the victim of a police shooting. See C.A. App. 439, 452. Cf. *United States* v. *Caldera*, 421 F.2d 152, 153 (9th Cir. 1970) (per curiam) (force used to prevent suspect from swallowing evidence was not so "shocking or unreasonable" to constitute due process violation); *United States* v. *Harrison*, 432 F.2d 1328, 1330 (D.C. Cir. 1970) (holding that police officer's grabbing of throat to prevent swallowing of heroin capsules was not shocking to the conscience because done "to prevent the destruction of evidence"). See generally *New York* v. *Quarles*, 467 U.S. at 657-658 (discussing need for questioning to secure public safety). In view of the important purpose of his questioning, and petitioner's mild restriction on respondent's

liberty interest—essentially, persistence in questioning a witness suffering from grave preexisting injuries despite his not wish to talk—"the challenged conduct falls short of the kind of misbehavior that * * * shocks the sensibilities of civilized society." *Moran* v. *Burbine*, 475 U.S. 412, 433-434 (1986) (failure to inform suspect during interrogation that lawyer had been engaged to represent him and wished to be present for questioning, and police misstatement to lawyer that suspect would not be questioned until next day, did not violate substantive due process).

Although respondent alleged that petitioner "with deliberate indifference interfered with the medical assistance to [him]" (Amended Compl. ¶ 13), the record is devoid of testimony or evidence from any medical personnel that petitioner's presence interfered with treatment, and there was considerable evidence that medical personnel continued to treat him. *E.g.*, C.A. App. 16-18, 90, 115, 271, 272. Indeed, the district court noted "there is insufficient evidence to establish that Chavez's actions interfered with plaintiff's treatment." Pet. App. 24a. Even taking the complaint at face value, the complaint's allegation that petitioner acted with "deliberate indifference" (Amended Compl. ¶¶ 13, 17) states a level of intent insufficient to support a constitutional violation in emergency situations of the sort at issue here. In *County of Sacramento* v. *Lewis*, *supra*, this Court held that allegations of "deliberate indifference" were insufficient to support a claim that police had violated the substantive due process rights of a suspect by engaging in a high-speed chase that resulted in the death of a passenger. 523 U.S. at 851-853. The same rule is required here. Petitioner was questioning the key witness to a police shooting, who he thought would soon die. If petitioner did not act quickly, the evidence likely would be lost. There can be no serious question that petitioner was required to act "in haste, under pressure, and * * * without the luxury of a second chance."

Id. at 853 (internal quotation marks omitted). Accordingly, respondent must make a showing that petitioner had "a purpose to cause harm." *Id.* at 854.

C. The Court Of Appeals' Rule Will Significantly Disrupt Legitimate Law Enforcement Efforts

The court of appeals' novel holding that the taking of an involuntary statement constitutes a completed Fifth and Fourteenth Amendment violation—without regard to whether it will be used in a criminal trial, or whether the circumstances of its taking are sufficiently severe to "shock the conscience"—will chill legitimate law enforcement efforts to obtain potentially life-saving information during emergencies. The *Miranda* exclusionary rule and restrictions on the use of involuntary confessions (*e.g. Mincey* v. *Arizona*, 437 U.S. at 398 (involuntary statements may not be used for any purpose at criminal trial)), already provide a strong deterrent against the taking of compelled statements, and the principles of *Rochin* and *Lewis* already prohibit egregious misconduct. Accordingly, the principal effect of the court of appeals' rule will be to limit the use of methods that do not "shock the conscience" to gather information in situations where interests in collecting evidence for criminal prosecutions are subsidiary to some other concern—for example, when there is an imminent threat of harm. While there is a limited exception to the *Miranda* rule for cases implicating public safety, see *New York* v. *Quarles*, 467 U.S. at 655-658, the court of appeals made no reference to *Quarles* nor any comparable accommodation for the demands of public safety, and did not address petitioner's claim that exigent circumstances required him to preserve respondent's testimony. By equating standards developed for "[]fairness in the use of evidence" (*Lisenba*, 314 U.S. at 236) with minimum standards for official conduct regardless of the use to which the statements are put, the court creates a serious risk of chilling the responsiveness of law enforcement when

it matters most—in the face of an immediate threat to public safety. The consequence of misjudging whether police conduct subsequently will be held to be within the public safety exception to *Miranda* and not unduly coercive is now personal liability, not just the exclusion of evidence at trial. That critical difference cannot help but chill law enforcement officers in the field.

Maintaining the distinction between police conduct that renders a statement inadmissible and police conduct that independently violates the Constitution provides necessary breathing space that furthers both the need for law enforcement to confront imminent threats and the civil liberties of those who stand trial for a criminal offense. The use of a statement in a criminal trial implicates constitutional interests distinct from those implicated by the process of obtaining the statement in the first place. Ignoring that critical difference, as the court of appeals did, necessarily means that some beneficial law enforcement efforts will be needlessly chilled or that some statements will improperly be entered into evidence. Society could not function if rules of admissibility set the outer limits on permissible police conduct; nor should minimum standards for police conduct govern admissibility in a criminal case. This case illustrates the critical difference between procuring statements and procuring statements *for use at trial*. Respondent's dire condition was the result of a police shooting, and respondent obviously is the key non-police witness to the episode. Obtaining the witness' statement over his objection for subsequent use against him in a criminal trial implicates far different constitutional interests than obtaining that same statement to preserve eyewitness testimony of potential police misconduct (or in a different case to procure a description of a dangerous suspect still at large).

As Justice Marshall wrote:

> If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. Such unconsented questioning may take place not only when police officers act on instinct but also when higher faculties lead them to believe that advising a suspect of his constitutional rights might decrease the likelihood that the suspect would reveal life-saving information. If trickery is necessary to protect the public, then the police may trick a suspect into confessing. While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in *Miranda* v. *Arizona* proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.

New York v. *Quarles*, 467 U.S. at 686 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting); cf. *id.* at 664 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("*Miranda* has never been read to prohibit the police from asking questions to secure the public safety," but only addresses admissibility of statements taken without warnings). This Court should "decline to place officers * * * in the untenable position of having to consider, often in a matter of seconds" (*New York* v. *Quarles*, 467 U.S. at 657-658), whether to risk not just hampering a prosecution but incurring personal liability in order to "neutralize the volatile situation confronting them." *Ibid.*

D. Even If Petitioner Violated Respondent's Constitutional Rights, Those Rights Were Not "Clearly Established" At The Time He Was Questioned

Even if this Court were to recognize for the first time a right to be free of coercive police questioning, petitioner

would be entitled to qualified immunity because the right was not "clearly established" at the time of his conduct. "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope* v. *Pelzer*, 122 S. Ct. 2508, 2515 (2002) (internal quotation marks omitted). If government officials "of reasonable competence" could disagree on whether the action is illegal, "immunity should be recognized." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). Given the sparsity of authority suggesting that coercive police questioning violates the Fifth and Fourteenth Amendments in the absence of police brutality or use of resulting statements in a criminal case, and the abundant authority to the contrary, petitioner is clearly entitled to qualified immunity.

1. There Is No Clearly Established Fifth Amendment Right To Be Free Of Coercive Police Questioning

Any claim that a reasonable officer would have known that coercive questioning alone would violate the Fifth Amendment is difficult to square with statements by this Court that are directly to the contrary. This Court has quite explicitly stated that while "conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." *Verdugo-Urquidez*, 494 U.S. at 264. Although that statement may be, as the court of appeals concluded (Pet. App. 10a n.3), "dicta," it reflects fundamental principles underlying much of this Court's Fifth Amendment doctrine. See pp. 8-15, *supra*. Moreover, laypersons in law enforcement should not be held personally liable for failing to distinguish *obiter dictum* from *ratio decidendi* when they are making necessarily hurried decisions in the field. Such an unequivocal statement from a controlling court must at a minimum introduce sufficient doubt about the correct state of the law to warrant immunity, especially because the Ninth Circuit ordinarily

"give[s] great weight to Supreme Court dicta." *Gubiensio-Ortiz* v. *Kanahele*, 857 F.2d 1245, 1259 n.10 (9th Cir. 1988).[9]

Significantly, every other court of appeals to have addressed the question has held that coercive questioning does not violate the Fifth Amendment unless resulting statements are used in a criminal case. See, *e.g.*, *DeShawn E.*, 156 F.3d at 346 ("there can be no Fifth Amendment violation until th[e] [compelled] statement is introduced against the defendant in a criminal proceeding"); *United States* v. *Gecas*, 120 F.3d 1419, 1432 (11th Cir. 1997) (Fifth Amendment protects against "the use of the testimony, not its compulsion"), cert. denied, 524 U.S. 951 (1998); *Riley* v. *Dorton*, 115 F.3d 1159, 1165 (4th Cir.) (en banc), cert. denied, 522 U.S. 1030 (1997); *Mahoney* v. *Kesery*, 976 F.2d 1054, 1061-1062 (7th Cir. 1992); *Davis* v. *City of Charleston*, 827 F.2d 317, 322 (8th Cir. 1987). Still others have held that no Fifth Amendment right against compelled questioning was "clearly established," even after *Cooper* v. *Dupnik*. See *Wiley*, 14 F.3d at 996 (Powell, J.); *Giuffre* v. *Bissell*, 31 F.3d 1241, 1256 (3d Cir. 1994) (noting "[t]he majority in *Cooper* broke new ground" in holding the Fifth Amendment was violated "even though [compelled] statements were never used"). "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999).

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[9] Compare, *e.g.*, *United States* v. *Marlow*, 278 F.3d 581, 588 n.7 (6th Cir.) ("[a]ppellate courts have noted that they are obligated to follow Supreme Court *dicta*") (collecting authorities), cert. denied, 122 S. Ct. 2342 (2002); *Harbury* v. *Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000) (considering itself bound by "firm and considered" *Verdugo-Urquidez* dicta regarding Fifth Amendment), rev'd on other grounds, 122 S. Ct. 2179 (2002).

2. There Is No Clearly Established Fourteenth Amendment Right To Be Free Of Coercive Police Questioning Under The Circumstances Of This Case

There is likewise no basis for concluding that petitioner's conduct violated a "clearly established" due process right. To begin with, this Court has never held (absent physical brutality) that coercion alone violates the Fourteenth Amendment: In cases from *Brown* v. *Mississippi* through *Mincey* v. *Arizona*, the Court has held it is the *admission into evidence* of such statements that violates the Constitution, and has rejected the notion that the conduct in obtaining statements itself violates procedural due process. *Lyons* v. *Oklahoma*, 322 U.S. at 605. While a handful of court of appeals decisions suggest that taking an involuntary confession itself violates due process, see *Cooper* v. *Dupnik*, *supra*; *Rex* v. *Teeples*, 753 F.2d 840, 843 (10th Cir.), cert. denied, 474 U.S. 967 (1985), those decisions are in tension with *Lyons* and with other court of appeals cases holding that, absent use of the statement, such claims are analyzed under the much more exacting "shocks the conscience" test of substantive due process. *E.g.*, *Wilkins* v. *May*, 872 F.2d 190, 195 (7th Cir. 1989) (although characterizing right as "procedural," holding it would not be violated absent misconduct that "shock[s] the conscience"), cert. denied, 493 U.S. 1026 (1990); see also *DeShawn E.*, 156 F.3d at 348 (challenged conduct must "be the 'kind of misbehavior that * * * shocks the sensibilities of civilized society'").

Petitioner's conduct did not approach the brutality that would have put a reasonable officer in November 1997 on notice that his conduct clearly violated respondent's substantive due process rights. There is no allegation that petitioner so much as touched respondent, nor is there evidence that petitioner caused harm to respondent by interfering with his medical treatment. Rather, petitioner questioned respondent for approximately ten minutes over a

period of 45 minutes in the face of requests to stop the interview until he had been treated for critical, painful injuries. Courts had found far more outrageous conduct not to violate substantive due process. See *Hopson* v. *Fredericksen*, 961 F.2d 1374, 1379 (8th Cir. 1992) (officer's utterance of a racial slur and threat to "'knock [the suspect's] remaining teeth out of his mouth' if he remained silent" failed "to rise to the level of a 'brutal and wanton act of cruelty'" sufficient to support substantive due process claim under Section 1983); *Wilkins* v. *May*, 872 F.2d at 195. See generally *United States* v. *Kelly*, 707 F.2d 1460, 1476 n.13 (D.C. Cir.) (Ginsburg, J.) (noting courts have found substantive due process violations only in a "slim category of cases in which the police have been brutal, employing against the defendant physical or psychological coercion that 'shocks the conscience'"), cert. denied, 464 U.S. 908 (1983).

Moreover, a reasonable officer would have had every reason to believe that courts would take into consideration efforts to preserve the testimony of a key witness thought to be nearing death. Courts (including the Ninth Circuit) had considered a police officer's effort to preserve evidence in mitigation of claims that conduct was so outrageous as to violate substantive due process. See, *e.g.*, *Caldera*, 421 F.2d at 153; *United States* v. *Peterson*, 455 F.2d 519, 519 (9th Cir. 1972) (per curiam); *Harrison*, 432 F.2d at 1330 (use of force "to prevent the destruction of evidence in the course of the execution of a valid warrant" did not shock the conscience). Other courts had considered different types of exigencies in determining whether conduct was so outrageous as to violate substantive due process. *E.g.*, *Boveri* v. *Town of Saugus*, 113 F.3d 4, 6-7 (1st Cir. 1997) (considering emergency nature of situation in determining whether police conduct violated substantive due process); *Rucker* v. *Har-*

ford County, 946 F.2d 278, 282 (4th Cir. 1991) (same), cert. denied, 502 U.S. 1097 (1992).[10]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[10] Nor would even *Cooper* v. *Dupnik* have put a reasonable officer on notice that "his conduct was unlawful in the situation he confronted" here. *Saucier*, 533 U.S. at 202. *Cooper* explicitly indicated that it did not "establish a cause of action *where police officers continue to talk to a suspect after he asserts his rights* and where they do so in a benign way, without coercion or tactics that compel him to speak." 963 F.2d at 1244. *Cooper* offers little useful guidance for cases not so "laden with police misconduct" as it was. *Ibid.* There was no indication of exigent circumstances in *Cooper*; rather, the officers were carrying out a preconceived plan to extract a confession from the suspect so as to "mak[e] it difficult, if not impossible, for [him] to take the stand in his own defense." *Id.* at 1249. The suspect there was subjected to conduct far more severe than that involved here. Cf. *id.* at 1248 (suspect subjected to "hours of mistreatment and what can fairly be described as sophisticated psychological torture").